BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BETTY E. MARTIN Claimant VS. **WESTVIEW MANOR, INC.** Respondent AND **ITT HARTFORD** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 177,964

ORDER

Respondent appeals from an Award rendered by Special Administrative Law Judge William F. Morrissey on March 8, 1995. The Appeals Board heard oral argument August 9, 1995.

APPEARANCES

Claimant appeared by and through her attorney Robert R. Lee, Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney P. Kelly Donley, Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney John C. Nodgaard, Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

On appeal respondent asks for review of the findings and conclusions regarding:

(1) Claimant's average weekly wage; and
(2) The nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

(1) Claimant was a full-time employee and accordingly her average weekly wage was $210.30.

Claimant worked as a certified nursing assistant at Westview Manor. She testified that she worked thirty-six to forty (36-40) hours per week and that overtime was occasionally offered. K.S.A. 1992 Supp. 44-511(a)(5) defines a full-time employee as:

> " . . . those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week."

Part-time employee is defined in K.S.A. 1992 Supp. 44-511(a)(4) as:

> " . . . any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee."

Respondent cites McMechan v. Everly Roofing, Heating & Air Conditioning, Inc., 8 Kan. App. 2d 349, 656 P.2d 797, rev. denied 233 Kan. 1092 (1983), indicating that in the definition of part-time employee the word "and" separating the clauses (a) and (b) must be construed to mean "or" when it is necessary to carry out the legislative intent. Respondent argues claimant was expected to work on a regular basis less than forty (40) hours per week and, therefore, was a part-time employee.

Mr. John Nicholas, Administrator of Westview Manor, testified that claimant was considered to work the same hours as other employees they considered full-time. The employees worked five (5) days out of a seven (7) day period and rotated through the weekends so that everyone had a fair share of weekends and holidays. Employees worked four (4) days and were off (2) days. The number of hours per day varied by shift. One of the shifts was seven and one-half (7 1/2) hours per day and the other was eight and one-half (8 1/2) hours per day.

The Appeals Board finds the evidence does not establish that claimant was regularly expected to work less than 40 hours, only that she might occasionally work less than 40 hours. In addition, respondent's argument would nullify the portion of K.S.A. 1992 Supp. 44-511(e)(5) indicating a person can be a full-time employee without working forty (40) hours. Accordingly, the Appeals Board concludes she was a full-time employee. She earned $5.25 per hour and her average overtime was 30 cents per week. Accordingly, her average weekly wage is calculated by multiplying $5.25 times 40 hours per week and adding average overtime of 30 cents, giving an average weekly wage of $210.30.

(2) The Appeals Board finds claimant is entitled to a work disability and benefits should be based upon a seventeen percent (17%) permanent partial general disability.

Respondent first argues that the claimant's award should be limited to functional impairment only based upon the holding in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994). In the Foulk decision, the Kansas Court of Appeals ruled that the presumption of no work disability should apply when claimant rejects offered employment at a comparable wage which the claimant has the ability to perform. In this case, claimant attempted to return to work after she had been released from treatment in August 1993. She testified that the work caused pain and she considered herself unable to continue with the work. Mr. Nicholas testified generally that he discussed with claimant accommodating her restrictions, once they became permanent. The record does not indicate, however, that respondent made an offer for work which claimant could perform. For that reason, the Appeals Board does not consider the Foulk decision controlling here.

The medical evidence supports claimant's assertion that her injury would prevent her from returning to her regular duties. Dr. Robert Eyster treated claimant for her injury. He last saw her on October 4, 1993 and recommended that she limit her work to lifting no more than fifty (50) pounds with no repetitive lifting of over twenty-five (25) pounds, with no working in a bent over position or repetitive bending or twisting in excess of twenty to twenty-five (20-25) times per hour. He rated her functional impairment at only one percent (1%). Ernest R. Schlachter, M.D., also examined claimant and evaluated her injury. He indicated that he would have recommended restrictions prohibiting her from lifting over thirty-five (35) pounds repetitively and forty-five (45) pounds on a single lift. He also would have recommended no bending, twisting or working in awkward positions. He believes she should sit part-time and stand part-time.

Two experts, Mr. Jerry Hardin and Ms. Karen Terrill, testified regarding the effect of the injury on claimant's ability to obtain employment in the open labor market and to earn a comparable wage. Both concluded she should be able to earn approximately the same hourly wage she had earned prior to her injury. Ms. Terrill opined she could earn $5.25 per hour and Mr. Hardin opined $5.00 per hour. Both concluded she had a zero percent (0%) loss of ability to earn a comparable wage.

On the other hand, both experts concluded she did have a loss of ability to obtain employment in the open labor market because of the restrictions recommended. Based upon Dr. Schlachter's restrictions Jerry Hardin concluded claimant lost fifty-five to sixty percent (55-60%) of her access to the open labor market. Mr. Hardin initially misunderstood Dr. Eyster's restrictions. He was not aware the limitation on bending and stooping allowed her to bend and stoop occasionally. With this clarification he changed his opinion and concluded she had a forty to forty-five percent (40-45%) loss of access to the open labor market based upon Dr. Eyster's restrictions.

Ms. Karen Terrill concluded claimant's loss of access to the labor market would be eleven percent (11%) based upon Dr. Eyster's restrictions and twenty-one percent (21%) based upon Dr. Schlachter's. Although Ms. Terrill expresses an additional opinion which assumes preinjury with certain restrictions prior to the current injury, the record as a whole does not support a finding that claimant had work restrictions prior to the current injury. She had lumbar and thoracic pain complaints in July 1991. She was released by Dr. Eyster at that time without any restrictions and testified that she did not have additional problems until the current injury.

The Appeals Board finds based upon the above evidence that claimant had the ability to earn a comparable wage and accordingly has a zero percent (0%) loss in the wage component of the work disability test. The Appeals Board finds it appropriate to give equal weight to the restrictions of each physician and to the opinions of the two vocational experts based upon those opinions. Mr Hardin's opinions average fifty percent (50%) loss of access and Ms. Terrill's sixteen percent (16%). Accordingly, the Appeals Board finds that claimant has approximately thirty-three percent (33%) loss of access to the open labor market. By giving equal weight to the loss of access and wage components to work disability as authorized in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), the Appeals Board finds and concludes claimant has a seventeen percent (17%) permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated March 8, 1995, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Betty E. Martin, and against the respondent, Westview Manor, Inc., and its insurance carrier, ITT Hartford, for an accidental injury which occurred on or about May 10, 1993, and based upon an average weekly wage of $210.30, for 22.43 weeks of temporary total disability compensation at the rate of $140.21 per week or $3,144.91, followed by 392.57 weeks at the rate of $23.84 per week or $9,358.87 for a 17% permanent partial general body impairment of function making a total award of $12,503.78.

As of October 13, 1995, there is due and owing claimant 22.43 weeks of temporary total disability compensation at the rate of $140.21 per week or $3,144.91, followed by 104.14 weeks of permanent partial disability compensation at the rate of $23.84 per week in the sum of $2,482.70, for a total of $5,627.61, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $6,876.17 is to be paid for 288.43 weeks at the rate of $23.84 per week, until fully paid or further order of the Director.

All compensation, medical expenses and administrative costs are to be borne wholly by the respondent and none by the Kansas Workers Compensation Fund.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed to the respondent to be paid direct as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Barber & Associates	
Transcript of Preliminary Hearing	$ 56.70
Deposition Services	
Transcript of Regular Hearing	$ 63.36
Deposition of Robert L. Eyster, M.D.	$112.68
Deposition of Karen Crist Terrill	$183.78
Deposition of John Nicholas	$154.08
Kelley, York & Associates	
Deposition of Betty E. Martin	$329.24
Ireland Court Reporters	
Deposition of Ernest R. Schlachter, M.D.	$155.65
Deposition of Jerry D. Hardin	$284.85

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, Kansas
P. Kelly Donley, Wichita, Kansas
John C. Nodgaard, Wichita, Kansas
William F. Morrissey, Administrative Law Judge
Philip S. Harness, Director